BEFORE THE

Federal Communications Commission

WASHINGTON, D. C.

In the Matter of	)	
	)	
Policies and Rules Concerning	)	
Children's Television Programming	)	MM Docket No. 93-48
	)	
Revision of Programming Policies	)	
for Television Broadcast Stations	)	

COMMENTS OF RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

J. Laurent Scharff
Reed Smith Shaw & McClay
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 457-8660

Jane E. Kirtley
The Reporters Committee
for Freedom of the Press
Suite 504
1735 I Street, N.W.
Washington, D.C. 20006

June 15, 1994

TABLE OF CONTENTS

BEFORE THE

Federal Communications Commission

WASHINGTON, D. C.

In the Matter of	)	
	)	
Policies and Rules Concerning	)	
Children's Television Programming	)	MM Docket No. 93-48
	)	
Revision of Programming Policies	)	
for Television Broadcast Stations	)	

To: The Commission (En Banc Hearing)

COMMENTS OF RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

The Radio-Television News Directors Association and The Reporters Committee for Freedom of the Press submit these comments in response to the Public Notice dated April 20, 1994, regarding the En Banc Hearing on Children's Television, in the above-captioned proceeding.[1/]

Summary

The Children's Television Act of 1990 violates the First Amendment by requiring television broadcasters to provide programming and supporting advertising material as the federal government demands; cable system operators also are unconstitutionally burdened with the advertising limitations.

1/ The Public Notice stated in pertinent part: "Interested persons not desiring to participate or not selected to participate in the en banc hearing may file written comments on June 8, 1994." By Order of June 2, 1994, the deadline for filing was extended to June 15, 1994.

Assuming that an independent regulatory agency may not lawfully decline to enforce an act of Congress, the Commission, nonetheless, may and should recognize the serious First Amendment and Fifth Amendment infringements threatened by the Act and proceed accordingly to minimize these infringements by implementing the Act in the manner least restrictive of the programming judgments of station licensees and cable system operators.

The Commission should definitely not, therefore, specify minimum amounts of educational and informational programming for children, as recommended by some parties. To the contrary, the Commission should heed the call of the U.S. Court of Appeals for the Eighth Circuit for greater sensitivity by the FCC to First Amendment interests. The Commission should itself repeat the call it made in Syracuse Peace Council for judicial reconsideration of the legal rationale that is used to justify this kind of legislation.

I. Statement of Interest and Position

The Radio-Television News Directors Association ("RTNDA") is the principal professional organization of journalists -- executives, editors, reporters and others -- who gather and disseminate news and other information on radio and television in the United States.

The Reporters Committee for Freedom of the Press ("The Reporters Committee") is a voluntary, unincorporated association

of news reporters and editors dedicated to protecting the First Amendment interests of the news media in press freedom cases.

The interest of these parties in this proceeding centers on the First Amendment right of radio and television -- broadcast and cable -- to be free of government control of program content.

II. The Commission Should Limit and Not Increase the Children's Programming Requirement

In its Notice of Inquiry in this proceeding, the Commission asked "whether and in what manner our rules and policies might be revised to more clearly identify the levels and types of programming necessary in the long term to adequately serve the educational and informational needs of children." 8 FCC Rcd 1841 ¶ 1 (1993).

RTNDA and The Reporters Committee urge the Commission to revise the rules, but not in the direction taken in the Notice. Rather, the Commission should take this opportunity to reconsider the constitutional infirmities of this kind of regulation of program content and to reexamine the Children's Television Act of 1990 with the First Amendment in mind.

The proposal in the Notice (¶ 9) that the Commission specify minimum amounts of educational and informational programming for children should certainly not be adopted. The Commission itself recognizes that Congress did not mandate quantitative standards (see id., ¶¶ 5, 9) and that quantitative processing guidelines are treated by broadcasters as if they are firm requirements (id., ¶ 9). Moreover, upon judicial review, a court would likely confirm the coercive effect of such guidelines. Nor should the

Commission attempt to define "core" programming or the appropriate length of programs for effective communication of ideas to children, as suggested in the Notice (¶ 8).

The government does not have the constitutional authority to control the content, including manner of presentation, of what are essentially journalistic programs. This is particularly true here because, as the Commission has acknowledged, there is "substantial difficulty inherent in adequately particularizing broadcasters' children's programming obligations while also affording licensees the discretion that Congress intended to reserve to them in meeting that obligation" (id., ¶ 5).

III. The Commission Should Interpret the Statute in a Manner Most Consistent With the First Amendment

In its Report and Order in MM Dockets 90-570 and 83-670,[2/] the Commission failed to address the First Amendment background which these parties contended the agency must consider in any rulemaking involving program content regulation.[3/] We reiterate here the importance of this constitutional dimension and urge the Commission to consider and respond to it in shaping its future course.

In Syracuse Peace Council,[4/] the Commission recognized the

2/ 6 FCC Rcd 2111, recon. granted in part, 6 FCC Rcd 5093 (1991).

3/ Comments of RTNDA et al. in MM Dockets 90-570, 83-670, Jan. 22, 1991.

4/ 2 FCC Rcd 5043 (1987), recon. denied, 3 FCC Rcd 2035 (1988), aff'd sub nom. Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), cert denied, 110 S.Ct. 717 (1990).

Red Lion[5/] rationale for broadcast content regulation as controlling law and applied the First Amendment standard utilized by the Court in the subsequent League of Women Voters case.[6/] That First Amendment standard permits government to impose content restrictions peculiar to broadcasting only in situations in which those restrictions are "narrowly tailored to further a substantial governmental interest" (which test in other speech and press contexts is employed only in content-neutral, time-place-and-manner regulation).[7/] Under that standard, the fairness doctrine could not and did not survive, for reasons explained in Syracuse Peace Council.

Similarly, the coercive programming requirements and advertising restrictions mandated by Congress in the Children's Television Act are not narrowly tailored to achieve a substantial governmental interest that is not already being satisfied by existing programming and advertising practices of broadcasters and cablecasters.[8/] There has been no showing of need for the

---

5/ Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

6/ FCC v. League of Women Voters of California, 460 U.S. 364, 380 (1984).

7/ See Syracuse Peace Council, 2 FCC Rcd at 5066 n. 118.

8/ Since cable system operators do not use radio frequencies to distribute their programming to their viewers, there is no justification under the "spectrum scarcity" rationale for regulation of cable advertising as mandated by the Act. The relay of cable programming by microwave in certain instances is no different than newspapers' use of satellite radio frequencies to relay newspaper material. Neither supports FCC content regulation, and the Act is therefore unconstitutional under existing Supreme Court law insofar as it applies to cable systems.

legislation and its prescribed FCC regulation; to the contrary, the FCC has determined that the market functions adequately to regulate the quantity and quality of children's television programming.[9/]

In any event, focusing on the current inquiry, there are less burdensome and intrusive means than FCC-dictated programming for increasing the amount of this kind of children's television programming.[10/] Any harm to children from the existing program practices has not been shown; any gain to children that can be expected from the prescribed and newly proposed practices has not been adequately assessed and weighed against the financial losses to the media parties involved and the predictable losses of other programs to the public. The injury to broadcasters' and cable operators' programming freedom is another serious loss to be reckoned.

9/ Children's Television Programming & Advertising Practices, 96 F.C.C. 2d 636 (1984) aff'd sub. nom. Action for Children's Television v. FCC, 756 F.2d 899 (D.C. Cir. 1985).

10/ One obvious and more direct alternative is federal aid to produce these children's programs for broadcast on non-commercial educational television stations. As recognized in footnote 2 of the Commission's 1990 Notice of Proposed Rulemaking in MM Dockets 90-570 and 83-670, 5 FCC Rcd 7199, 7204 n.2 (1990) a National Endowment for Children's Educational Television, with $6 million in funding, was created by Title II of the same Children's Television Act. In Title I of the Act, on the other hand, the Congress has simply commandeered program and advertising resources from the commercial television industry without the just compensation required by the Fifth Amendment.

Consequently, the Commission should not adopt any regulation beyond the absolute minimum necessary to implement the Act,[11/] and should explain the deep constitutional concerns that attend this objectionable form of regulation, even under the Supreme Court's questioned rationale and standard in Red Lion and League of Women Voters.

IV. The Coercion of Children's Programs Would Displace Other First-Amendment Protected Programs

No one contests the desirability of educational and informational programs for children. There are, however, a great many differences of opinion as to what programming qualifies as such, how much is needed for different age groups, to what extent programs that adults watch satisfy such needs, and whether stations other than those licensed specifically as educational stations need do more in this area. Moreover, these and many other such value-laden questions focusing on children -- about which the Commission has no special expertise -- are only part of the equation. Also to be considered is the question of what other kinds of programs should be given up by the television stations in order to accommodate an increased amount of the kind of children's programming which the government prefers.[12/] Further, one needs

---

11/ The Commission has proceeded with that purpose in its rulemaking to develop a better test for a "renewal expectancy" in comparative renewal cases. Third Further Notice of Inquiry and Notice of Proposed Rule Making, 4 FCC Rcd 6363 (1989). RTNDA supported the Commission's proposal. Letter of David Bartlett, RTNDA President, to Chairman Sikes, Oct. 3, 1989, in that docket.

12/ In striking down newspaper content regulation in Miami Herald

Continued on following page

to consider what other kinds of unprofitable and desirable programs (e.g., special news coverage) stations will have to give up because of losses in revenue from the reduced amounts and the reduced prices of commercials on existing children's programs and on new, government-preferred children's programs that will probably not attract large audiences for advertisers.

Prior to the Children's Television Act of 1990, questions on children's programming and advertising were left to be answered by the combination of the audience-driven commercial television marketplace (both broadcast and cable) and the private and government underwriting of non-commercial educational television stations and other programmers. Non-commercial stations operate on channels reserved for educational, informational and other kinds of programs that are thought to be not assured in adequate amounts by the commercial value of the public's own viewing choices.[13/]

Continued from previous page
v. Tornillo, 418 U.S. 241, 256-57 & n.22 (1974), the Supreme Court recognized that broadcasters are subject to "finite technological limitations of time" more inflexible than the limitations of space in a newspaper, but nevertheless found it highly relevant to the First Amendment analysis that, "if a newspaper is forced to publish a particular item, it must as a practical matter, omit something else."

13/ It is ironical that the Commission is not holding noncommercial television stations to the children's programming record-keeping and filing requirements applied to commercial stations, even though noncommercial stations are the very class of stations using frequencies reserved for the purpose in question. See Memorandum Opinion and Order in Dockets 90-570 and 83-670 (Reconsideration), 6 FCC Rcd 5093, 5101-02 (1991). The Commission's determination that noncommercial stations are meeting the intent of the Act through "delivery of high-quality children's programming"

Continued on following page

In this way the special television needs of children and others in our society can be met without violating the First Amendment by coercing information media to disseminate information in a government-approved manner. If children's educational and informational programming can be lawfully coerced, why not coerce the same special attention by television for the benefit of other societal groups (e.g., the elderly) that are viewed to be too weak economically to have their special program needs met through the existing combination of commercial and non-commercial television? Indeed, if this kind of program dictation is constitutional, why could not the government, in the name of promoting an informed electorate and other national policies, prescribe degrees of priority for every kind of program, including news and other informational and educational programs for adults? The First Amendment, we contend, does not permit this train of events to begin.

V. The Commission Should Follow Court Admonitions And Its Own Teaching In the Syracuse Peace Council Case

In its landmark Syracuse Peace Council opinion, the Commission dramatically disowned its earlier view that a spectrum scarcity rationale justified FCC regulation of broadcast program content in a manner that would not pass muster if applied to the print media. After serious reflection, the Commission sent the "signal" called for in the Supreme Court's League of Women Voters

---

Continued from previous page
(id.) points up the lack of any showing of compelling need for coercing more programming of this kind from commercial stations.

opinion[14/] for high court reconsideration of the scarcity rationale embedded in Red Lion.[15/] In the same way in this proceeding, the Commission should again send the "signal" that recognizes the correct First Amendment position, even though the Commission feels bound to enforce Congress' unconstitutional command.

This view of the First Amendment's application to broadcasting has support in a majority opinion of the U.S. Court of Appeals for the District of Columbia Circuit. In Telecommunications Research and Action Center v. FCC, the Court urged the Supreme Court to "revisit this area of the law," explaining that "the line drawn between the print media and the broadcast media, resting as it does on the physical scarcity of the latter, is a distinction without a difference. Employing the

---

14/ 468 U.S. at 376-77 n.11.

15/ The Commission stated in Syracuse Peace Council (2 FCC 2d at 5053):

> "We believe that the *1985 Fairness Report*, as reaffirmed and further elaborated on in today's action, provides the Supreme Court with the signal referred to in *League of Women Voters*. It also provides the basis on which to reconsider its application of constitutional principles that were developed for a telecommunications market that is markedly different from today's market. We further believe that the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press. Therefore, in response to the question raised by the Supreme Court in *League of Woman Voters*, we believe that the standard applied in *Red Lion* should be reconsidered and that the constitutional principles applicable to the printed press should be equally applicable to the electronic press."

scarcity concept as an analytical tool ... inevitably leads to strained reasoning and artificial results."[16/]

During the past six months, 10 of the 11 judges of the U.S. Court of Appeals for the Eighth Circuit have voiced their doubts about the constitutionality of FCC program-content regulation. In a fairness doctrine case this past December, five judges opined that the Supreme Court would likely reconsider the Red Lion rationale for content regulation "now that broadcast frequencies and channels have become much more available." Arkansas AFL-CIO v. FCC, 11 F.3d 1430, 1442 n.12, 1443 (8th Cir. 1993)(en banc). Chief Judge Richard S. Arnold, writing separately for himself and two of the other four like-minded judges, said (id. at 1443):

> "[D]evelopments subsequent to Red Lion appear at least to raise a significant possibility that the First Amendment balance struck in Red Lion would look different today. There is something about a government order compelling someone to utter or repeat speech that rings legal alarm bells. The Supreme Court believed, almost 25 years ago, that broadcasting was sufficiently special to overcome this instinctive feeling of alarm. In my opinion, there is a good chance that the legal landscape has changed enough since that time to produce a different result."

In a still more recent case, Forbes v. Arkansas Educational Television Communication Network Foundation,[17/] an additional five judges of the Eighth Circuit, quoting from Judge Arnold's opinion in the Arkansas AFL-CIO case and referring to his majority opinion

---

16/ 801 F.2d 501, 508, 509, reh. en banc denied, 806 F.2d 1115 (D.C. Cir. 1986), cert. denied, 482 U.S. 919 (1987) (footnotes omitted).

17/ 22 Med. L. Rep. 1615 (8th Cir. 1994).

in the case then before them, echoed this theme that Red Lion appears outmoded and that the FCC may not be as protective of First Amendment interests as it should be:

> "It may be true that the FCC is not as vigilant or as sensitive to first amendment interests as it should be. * * * It may also be true that technological changes since the Supreme Court decided Red Lion Broadcasting Co. v. FCC in 1969 have largely undermined the basis for the existing pervasive federal regulation of the broadcasting industry as a whole and, as a result, 'raise a significant possibility that the First Amendment balance struck in Red Lion would look different today.' See Arkansas AFL-CIO v. FCC, 11 F.3d 1430, 1442 (8th Cir. 1993) (banc) (Richard S. Arnold, C.J., concurring in the judgment)."[18/]

In Syracuse Peace Council, the Commission itself stated:

> "There are those who argue that the acceptance by broadcasters of government's ability to regulate the content of their speech is simply a fair exchange for their ability to use the airwaves free of charge. To the extent, however, that such an exchange allows the government to engage in activity that would be proscribed by a traditional First Amendment analysis, we reject that argument. It is well-established that government may not condition the receipt of a public benefit on the relinquishment of a constitutional right. *** Indeed, the fact that government is involved in licensing is all the more reason why the First Amendment protects against government control of content."[19/]

Having already recognized that the government has no right to condition a license upon the relinquishment of a constitutional

---

18/ Id. at 6 (concurrence in part and dissent in part).

19/ 2 FCC Rcd at 5055 (footnotes omitted).

right, the Commission should recognize here that, broadly interpreted to permit program coercion, the Children's Television Act would violate the First Amendment, for reasons discussed above. For many of the same reasons, the Act, especially if interpreted to require the taking of specific amounts of broadcasters' air time for occupation by programming dictated by the government, would violate the Just Compensation Clause of the Fifth Amendment. See Bell Atlantic Telephone Companies v. FCC, 1994 WL 247134, D.C. Cir. No. 92-1619, decided June 10, 1994; and note 10, supra.

It is not the purpose of RTNDA and The Reporters Committee to duplicate the comments of other parties making specific proposals for minimizing the burden of the Commission's intended regulations. The emphasis here is on the point that such minimization is constitutionally required.

Conclusion

The Commission should not enlarge upon the requirements for educational and informational programs for children and should reconsider its existing rules with the purpose of promulgating the least restrictive rules possible under the Children's Television Act of 1990. Just as important, the Commission should "signal" again that technological developments have undermined the "scarcity rationale" for broadcast content regulation and that,

therefore, in its view, such regulation is a violation of the First Amendment.

Respectfully submitted,

RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

By: J. Laurent Scharff

J. Laurent Scharff
Reed Smith Shaw & McClay
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 457-8660

Their Attorneys

Of Counsel:

Jane E. Kirtley
The Reporters Committee
for Freedom of the Press
Suite 504
1735 I Street, N.W.
Washington, D.C. 20006

June 15, 1994